

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)
	)
Sioux Valley Rural Television, Inc.	)
License No. IVM289B	)
	)
Request for Remedial Bidding Credit and Refund	)
	)
	)
	)

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 3, 2002**

**Released: October 9, 2002**

By the Managing Director:

**I. INTRODUCTION**

1. We have before us Sioux Valley Rural Television, Inc.'s ("Sioux Valley") Petition for Reconsideration<sup>1</sup> of a Revenue and Receivable Operations Group letter<sup>2</sup> that explained that it was unable to process Sioux Valley's request for a refund based on the remedial bidding credit from the 218-219 MHz Service Auction ("Auction No. 2"). We conclude that the Revenue and Receivable Operations Group correctly declined to process Sioux Valley's refund request and, accordingly, deny Sioux Valley's Petition for the reasons set forth below.

**II. BACKGROUND**

2. On July 28 and 29, 1994, the Commission conducted Auction No. 2.<sup>3</sup> The applicable rules at the time included provisions to encourage participation by small businesses and minority- and/or women-owned entities.<sup>4</sup> Small businesses were permitted to pay eighty-percent of their winning bids in installments while minority- and/or women-owned entities were eligible for a twenty-five percent bidding

<sup>1</sup> Petition for Reconsideration, filed by Sioux Valley on August 16, 2001 ("Petition").

<sup>2</sup> Letter to Jay N. Lazrus, Counsel for Sioux Valley from Susan Donahue, Chief, Revenue and Receivable Operations Group (July 17, 2001) ("*Revenue and Receivable Letter*").

<sup>3</sup> The 218-219 MHz Service was formerly known as the Interactive Video Data Service ("IVDS"). Announcing High Bidders for 594 Interactive Video and Data Service (IVDS) Licenses, *Public Notice*, Mimeo No. 44160 (rel. August 2, 1994) ("*IVDS Closing PN*"); Erratum to August 2, 1994 Public Notice Announcing High Bidders for 594 Interactive Video and Data Service (IVDS) Licenses, *Public Notice*, Mimeo No. 44265 (rel. August 9, 1994).

<sup>4</sup> Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fourth Report and Order*, 9 FCC Rcd 2330, 2336, ¶ 36 (1994) ("*Competitive Bidding Fourth Report and Order*").

credit that could be applied to one of the two licenses available in each market.<sup>5</sup> Bidders that were small businesses and minority- and/or women-owned entities could use installment financing as well as bidding credits.<sup>6</sup> Sioux Valley, the winning bidder for license MSA289B (Rapid City, South Dakota), was neither a small business nor a minority- and/or women-owned entity and, therefore, ineligible for bidding credits and installment payment financing. Thus, it paid its full winning bid of \$27,000 for license MSA289B.<sup>7</sup>

3. At the time the Commission's rules were adopted for Auction No. 2, the "intermediate scrutiny standard" of review applied to federal programs designed to enhance opportunities for racial minorities and women.<sup>8</sup> In June 1995, almost a year after Auction No. 2 concluded, the U.S. Supreme Court decided *Adarand Constructors v. Pena*, which held that racial classifications are subject to "strict scrutiny" and will be found unconstitutional unless "narrowly tailored" and in furtherance of "compelling governmental interests."<sup>9</sup> The following term, the U.S. Supreme Court decided *United States v. Virginia*, which held that the government must demonstrate an "exceedingly persuasive justification" to successfully defend gender-based programs.<sup>10</sup>

4. In order to address the legal requirements of *Adarand* and *VMI*, the Commission, in the *Competitive Bidding Tenth Report and Order*, modified certain competitive bidding provisions concerning the treatment of small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies for the then-planned second IVDS auction.<sup>11</sup> Additionally, in order to avoid undue delay of future auctions in other services, the Commission eliminated the race- and gender-based provisions for those auctions and instead employed a similar provision for small businesses.<sup>12</sup> The Commission on its own motion subsequently released the *218-219 MHz Notice of Proposed Rulemaking* to examine issues related to the 218-219 MHz Service.<sup>13</sup>

5. On September 10, 1999, the Commission released the *218-219 MHz Order*, which eliminated from the Commission's rules the bidding credit for minority- and women-owned businesses

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<sup>5</sup> *Id.*; 47 C.F.R. § 95.816(d)(1) ("A bidding credit is available for a license for either frequency segment A or frequency segment B in each service area. A bidding credit, however, may be applied to only one of the two licenses available in each service area").

<sup>6</sup> *Competitive Bidding Fourth Report and Order*, 9 FCC Rcd at 2337-39, ¶¶ 46-47.

<sup>7</sup> *IVDS Closing PN* at 17702.

<sup>8</sup> *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 564-65 (1990) ("... benign race-conscious measures mandated by Congress ... are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.").

<sup>9</sup> *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

<sup>10</sup> *United States v. Virginia*, 518 U.S. 515, 531 (1996).

<sup>11</sup> Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Tenth Report and Order*, 11 FCC Rcd 19974, 19975-77, ¶¶ 1-3 (1996) ("*Competitive Bidding Tenth Report and Order*"); see Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Sixth Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 19341, 19369, ¶ 67 (1996) (proposed rules for the then-planned second IVDS auction).

<sup>12</sup> Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Sixth Report and Order*, 11 FCC Rcd 136, ¶ 1, 161, ¶ 47, and 167, ¶ 59 (1995) (C block rules); Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Narrowband PCS, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456, 10475, ¶ 37, and 10492, ¶ 84 (2000).

<sup>13</sup> Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC Rcd 19604 (1998) ("*218-219 MHz Notice of Proposed Rulemaking*").

previously offered in Auction No. 2.<sup>14</sup> Thus, all minority- and women-owned businesses lost the bidding credit they had previously received in Auction No. 2.<sup>15</sup> At the same time, to fulfill the Commission's statutory mandate of encouraging participation by small businesses, rural telephone companies, and businesses owned by members of minority groups and women, the Commission granted a retroactive twenty-five percent bidding credit to the accounts of "every winning bidder in the 1994 auction of what is now the 218-219 MHz Service that met the small business qualifications for that auction."<sup>16</sup> The Commission noted that this approach minimized the disruption to the public and entities that previously received a bidding credit and that similar bidding credits had been provided to bidders in other services.<sup>17</sup> The Commission also delegated to the Wireless Telecommunications Bureau ("Bureau") and the Office of Managing Director ("OMD") the authority to implement the provisions in the *218-219 MHz Order*.<sup>18</sup>

6. Several petitions for reconsideration of the *218-219 MHz Order* were filed that challenged the constitutionality of the remedial bidding credit and sought to extend the credit to all bidders regardless of size.<sup>19</sup> Sioux Valley did not file a petition for reconsideration of the *218-219 MHz Order*. In the *218-219 MHz Second Reconsideration Order*, the Commission determined that the remedial bidding credit was constitutional and, accordingly, rejected the request to expand the remedial bidding credit to all winning bidders in Auction No. 2.<sup>20</sup>

7. On February 15, 2001, the Bureau and OMD exercised their delegated authority and issued a *Refund Procedures PN* explaining the procedures relating to the remedial bidding credit.<sup>21</sup> As explained in the *Refund Procedures PN*, refunds generated by the remedial bidding credit would only be paid to the payor of record of the upfront, first, and second down payments.<sup>22</sup>

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<sup>14</sup> Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 1497, 1533-55, ¶¶ 61-64 (1999) ("*218-219 MHz Order*"); 47 C.F.R. § 95.816(g).

<sup>15</sup> *218-219 MHz Order*, 15 FCC Rcd at 1533-34, ¶¶ 60-61.

<sup>16</sup> *Id.* at 1533, ¶ 61; 47 U.S.C. § 309(j); 47 C.F.R. § 95.816(f).

<sup>17</sup> *218-219 MHz Order*, 15 FCC Rcd at 1534, ¶ 61-63; Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Third Order on Reconsideration of the Report and Order and Memorandum Opinion and Order*, 17 FCC Rcd 8520, 8523, at n. 28 (2002) ("*218-219 MHz Third Reconsideration Order*").

<sup>18</sup> *218-219 MHz Order*, 15 FCC Rcd at 1549, ¶ 54.

<sup>19</sup> *218-219 MHz Order*, 15 FCC Rcd 1497; Petition for Reconsideration, filed by Celtronix Telemetry, Inc., TV-Active, L.L.C., Texas Interactive Network, Inc., Hispanic & Associates, Zarg Corporation, IVDS Interactive Acquisition Partners, United Interactive Partners, Inc., and G. Ray Hale on December 3, 1999 at 5-10 ("Coalition Petition"); Petition for Reconsideration, filed by Kingdon R. Hughes on December 3, 1999 ("Hughes Petition").

<sup>20</sup> Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Second Order on Reconsideration of the Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd at 25020, 25041, ¶ 44 (2000) ("*218-219 MHz Second Reconsideration Order*").

<sup>21</sup> 218-219 MHz Service (formerly known as IVDS) Refund Procedures, *Public Notice*, 16 FCC Rcd 3453 (2001) ("*Refund Procedures PN*"). The Bureau also released a number Public Notices relating to the 218-219 MHz financial restructuring plan. See Implementation Procedures for the Report and Order and Memorandum Opinion and Order Addressing the 218-219 MHz Service (formerly known as Interactive Video and Data Service (IVDS)), *Public Notice*, 15 FCC Rcd 7329 (2000); Frequently Asked Questions Regarding the Restructuring Rules of the 218-219 MHz Service, *Public Notice*, 15 FCC Rcd 7305 (2000); Wireless Telecommunications Bureau Announces Preliminary Implementation Procedures for 218-219 MHz Service (formerly known as Interactive Video and Data Service (IVDS)), *Public Notice*, 15 FCC Rcd 22 (1999).

<sup>22</sup> *Refund Procedures PN*, 16 FCC Rcd at 3453.

8. On March 16, 2001, Myers Lazrus Technology Law Group, on behalf of Sioux Valley, submitted a letter to the Revenue and Receivable Operations Group requesting a refund based on the remedial bidding credit from Auction No. 2.<sup>23</sup> On July 17, 2001, the Revenue and Receivable Operations Group issued a letter explaining that the request would not be processed because: (1) Sioux Valley was not a small business and, thus, ineligible for the remedial bidding credit; and (2) the entity that requested the refund is not the payor of record.<sup>24</sup>

9. On August 16, 2001, Sioux Valley filed the instant Petition contending that the remedial bidding credit violates its equal-protection rights because the Commission limited the retroactive application of the credit to small businesses;<sup>25</sup> the “conversion” of race- and gender-based bidding credit to a small business bidding credit is impermissibly motivated because it retains the original race- and gender-based preferences;<sup>26</sup> no record has been established to support the adoption of the small business bidding credit or the rationale for limiting it to small businesses;<sup>27</sup> and the adoption of the remedial bidding credit violated the notice and comment requirement of the Administrative Procedure Act (“APA”).<sup>28</sup>

10. On July 1, 2002, Sioux Valley and other parties<sup>29</sup> filed a petition for review with the Court of Appeals for the D.C. Circuit<sup>30</sup> challenging the Commission’s rulemaking decisions addressing the licensing and use of frequencies in the 218-219 MHz band.<sup>31</sup>

### III. DISCUSSION

11. By statute, Congress limited the Commission’s jurisdiction to review petitions for reconsideration to those filed within a specific time period.<sup>32</sup> Section 1.106(f) of the Commission’s rules implements this statutory mandate and requires that a petition for reconsideration be filed within thirty

<sup>23</sup> Letter to Tom Putnam, Office of Managing Director, from Jay N. Lazrus, Counsel for Sioux Valley Rural Television, Inc. (March 16, 2001).

<sup>24</sup> *Revenue and Receivable Letter*.

<sup>25</sup> Petition at 7 (citing *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1959) (permitting a party that did not challenge the promulgation of a rule to bring an action resisting its later application)).

<sup>26</sup> Petition at 5-6 (citing *Hunt v. Cromartie*, 526 U.S. 541 (1999) (facially neutral policy may violate constitution if it is impermissibly motivated)).

<sup>27</sup> Petition at 7. Sioux Valley also contests the Commission’s finding that limiting the remedial bidding credit to small businesses furthers Congress’ mandate of disseminating licenses among a wide variety of applicants. Petition at 6-7.

<sup>28</sup> Petition at 5-8. Sioux Valley contends that in adopting Section 95.816(g), the Commission failed to: (1) include the terms or substance of Section 95.816(g), or a description of the constitutional issues involving alleged race- and gender-discrimination that were remanded to the Commission in the *Graceba* case in the *218-219 MHz Notice of Proposed Rulemaking*; and (2) give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments, as required by the APA. *Id.*; 5 U.S.C. § 553 (b)(3), (c).

<sup>29</sup> *Sioux Valley Rural Television Inc., G. Ray Hale, TV-Active, LLC, Dr. Joseph Zavaletta, IVDS Acquisition Partners, and Celtronix Telemetry, Inc. v. FCC*, No 02-1208 (D.C. Cir. filed July 1, 2002) (“*Sioux Valley Petition for Review*”).

<sup>30</sup> *Id.*

<sup>31</sup> *218-219 MHz Report and Order*, 15 FCC Rcd 1497; *218-219 MHz Reconsideration Order*, 14 FCC Rcd 21078; *218-129 MHz Second Reconsideration Order*, 15 FCC Rcd at 25038-43; *218-219 MHz Third Reconsideration Order*, 17 FCC Rcd 8520.

<sup>32</sup> 47 U.S.C. § 405(a) (“A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of.”).

days from the date of public notice of the Commission's action.<sup>33</sup> As noted above, Sioux Valley did not file a timely challenge to the remedial bidding credit at the time the rule was promulgated. Rather, it waited until after its request was rejected to file the instant Petition, raising constitutional and procedural challenges to the remedial bidding credit as applied almost two years after the release of the order adopting the remedial bidding credit. For the reasons set forth below, we dismiss this Petition as repetitious and untimely because these arguments were previously the subject of reconsideration and fully addressed by the Commission in its prior orders.<sup>34</sup>

12. As previously noted in the *218-219 MHz Third Reconsideration Order*, the Commission does not grant reconsideration for the purpose of allowing a petitioner to reiterate arguments already presented, especially where a petitioner advances arguments that the Commission previously considered and rejected in a prior order on reconsideration.<sup>35</sup> Otherwise, the Commission "would be involved in a never ending process of review that would frustrate the Commission's ability to conduct its business in an orderly fashion."<sup>36</sup> Moreover, repetitious petitions such as this one can potentially delay judicial review where the request places again before the Commission the same issues it has already addressed with respect to the same party or similar parties in the past in other contexts.<sup>37</sup> In this case, a comparison of Sioux Valley's Petition for Reconsideration of the *Revenue and Receivable Letter* and various Petitions for Reconsideration<sup>38</sup> of the *218-219 MHz Order* and the *218-219 MHz Second Reconsideration Order* establishes that Sioux Valley's constitutional and procedural arguments in its petition were previously raised and fully addressed in the *218-219 MHz Second Reconsideration Order* and the *218-219 MHz Third Reconsideration Order*.<sup>39</sup> Accordingly, pursuant to our rules, we dismiss these arguments as

<sup>33</sup> 47 C.F.R. § 1.106(f) ("The petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of the final Commission action . . .").

<sup>34</sup> To the extent that Sioux Valley argues that it may have a separate right to raise challenges to the remedial bidding credit as applied, we dismiss these arguments as repetitious pursuant to Section 1.106(k)(3) of the Commission rules. 47 C.F.R. § 1.106(k)(3) (" . . . A petition for reconsideration of an order which has been previously denied on reconsideration may be dismissed by the staff as repetitious."); *218-219 MHz Second Reconsideration Order*, 15 FCC Rcd at 25038-43, ¶¶ 40-48; *218-219 MHz Third Reconsideration Order*, 17 FCC Rcd at 8525-28, ¶¶ 14-20; see 47 C.F.R. § 1.429(i) (limiting subsequent reconsiderations to modifications made to original order on reconsideration); see also *Functional Music*, 274 F.2d at 546 ("unlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity").

<sup>35</sup> *218-219 MHz Third Reconsideration Order*, 17 FCC Rcd at 8525, ¶ 15; 47 C.F.R. § 1.106(k)(3); *WWJZ, Inc.*, 37 FCC 685 (D.C. Cir. 1964) (reconsideration will not be granted to debate matters upon which we have already deliberated and spoken).

<sup>36</sup> Applications of Warren Price Communications, Inc. Bay Shore, New York et al., For a Construction Permit for a New FM Station on Channel 276 at Bay Shore, New York, *Memorandum Opinion and Order*, 7 FCC Rcd 6850 (1992) (a second petition for reconsideration is not contemplated by the rules and may be dismissed as repetitious) (citing VHF Drop-Ins, 3 Rad. Reg. 2d 1549, 1551 n.3 (1964)).

<sup>37</sup> Where the same subject matter is pending before the Commission on a reconsideration petition filed by another party, the courts typically hold judicial review in abeyance until all related actions are resolved by the Commission. See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 23 n.27 (D.C. Cir), cert. denied, 434 U.S. 829 (1997); *Wrather-Alvarez Broadcasting, Inc. v. FCC*, 248 F.2d 646, 648-49 (D.C. Cir 1957) (holding judicial review in abeyance until administrative reconsideration has been completed with respect to parties who are not parties to the reconsideration petition); see also *Celtronix Telemetry, Inc. v. FCC*, 2001 WL 799945 (D.C. Cir. 2001); *Bellsouth Corp. v. FCC*, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994); *Southland Industries v. FCC*, 99 F.2d 117 (1938).

<sup>38</sup> Coalition Petition; Hughes Petition.

<sup>39</sup> Petition; Coalition Petition; *218-219 MHz Second Reconsideration Order*, 15 FCC Rcd at 25041-43, ¶¶ 40-48; *218-219 MHz Third Reconsideration Order*, 17 FCC Rcd at 8525-28, ¶¶ 14-20.

repetitious.<sup>40</sup>

13. We also note that Sioux Valley's APA argument is an untimely collateral challenge to the promulgation of the remedial bidding credit rule.<sup>41</sup> Generally, collateral challenges to agency regulations made outside the applicable statutory limitations period are not permitted.<sup>42</sup> To permit such challenges would undermine Congress' determination that the agency's interest lies in the prompt review of agency regulations<sup>43</sup> and the notion of finality.<sup>44</sup> Here, Sioux Valley's challenge to the procedural genesis of the remedial bidding credit<sup>45</sup> is clearly well beyond the statutory and regulatory thirty (30) day limitations period.<sup>46</sup> Accordingly, we dismiss Sioux Valley's untimely and repetitious challenge to the remedial bidding credit.

#### IV. ORDERING CLAUSE

14. For the reasons set forth above, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 257, 303(b), 303(g), 303(h), 303(q), 303(r), 309(j) and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 257, 303(b), 303(g), 303(h), 303(q), 303(r), 309(j) and 332(a), and Section 1.106 of our rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by Sioux Valley Rural Television, Inc. is DISMISSED.

15. IT IS FURTHER ORDERED that this *Memorandum Opinion and Order* is adopted and that a copy of this *Memorandum Opinion and Order* be sent to Sioux Valley Rural Television, Inc. via certified mail, return-receipt requested and published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Andrew S. Fishel  
Managing Director

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<sup>40</sup> 47 C.F.R. § 1.106(k)(3).

<sup>41</sup> 47 U.S.C. § 405(a); *JEM Broad. Co. v. FCC*, 22 F.3d 320 (D.C. Cir. 1994) (barring untimely attack on the procedural genesis of regulations in the context of an enforcement action); *NLRB Union v. FLRA*, 834 F.2d 191, 195-97 (D.C. Cir. 1987) (summarizing circuit law with respect to various types of challenges).

<sup>42</sup> *NLRB Union v. FLRA*, 834 F.2d 191, 195-97 ("A petitioner's contention that a regulation suffers from some *procedural* infirmity, such as an agency's unjustified refusal to allow affected parties to comment on a rule before issuing it in final form, will not be heard outside of the statutory limitations period."); *Natural Resource Defense Council v. NRC*, 666 F.2d 595 (D.C. Cir. 1981); *JEM Broad. Co. v. FCC*, 22 F.3d 320, 325 ("challenges to the *procedural lineage of agency regulations*, whether raised by direct appeal, by petition for amendment or rescission of the regulation or as a defense to an agency enforcement proceeding, will not be entertained outside [the period] provided by statute").

<sup>43</sup> *Mountain States Tel. & Tel. Co. v. FCC*, 939 F.2d 1035, 1040 (D.C. Cir. 1991).

<sup>44</sup> *Natural Res. Def. Council*, 666 F.2d at 602 (Finality "conserv[es] administrative resources and protect[s] the reliance interests of regulatees who conform their conduct to the regulations.").

<sup>45</sup> Petition at 7.

<sup>46</sup> By statute and rule, the appropriate time to challenge the promulgation of the remedial bidding credit is "thirty-days from the date upon which public notice is given of the order, decision, report, or action complained of." 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(f); *see also JEM Broad. Co. v. FCC*, 22 F.3d 320, 324.